

Looper



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Gentex Corporation

File: B-222650

Date: August 13, 1986

DIGEST

Where there is no evidence to establish that a proposal modification ever was received by the procuring activity, notwithstanding protester's assertion that it in fact sent a telex modifying its price, or that government mishandling in the process of receipt was the paramount cause of nonreceipt, copy of modification submitted with postaward protest may not be considered.

DECISION

Gentex Corporation protests award of a contract to Safetech, Inc., under request for proposals (RFP) No. F41608-85-R-1769, issued by Kelly Air Force Base, San Antonio Air Logistics Center, for helmet visor lenses. Gentex argues that it telegraphed a proposal modification to the Air Force before the closing date for receipt of proposals and that but for agency mishandling that resulted in the Air Force's failure to receive the telex, Gentex would have been the low offeror.

We deny the protest.

The solicitation provided for receipt of proposals by November 25, 1985. The Air Force received three proposals, including one from the protester. Gentex asserts that by telex of November 20 to the contracting officer, it reduced its price per unit thereby becoming the low offeror. The Air Force maintains that it never received Gentex's telex modifying its proposal and that Gentex not only was the third low offeror but also had taken exception to the terms of the amended shipping instructions clause of the RFP, rendering the offer unacceptable. The Air Force made award based on the initial offers to Safetech at \$15.48 per unit on May 30, 1986.

Gentex contends that its records indicate its proposal modification was received by the Air Force on November 20, 1985. Gentex supports this assertion by affidavits of the Gentex contracts administrator and the secretary who sent the telex, as well as with Gentex's copy of the telex. The affidavits give details as to sending of the telex from the Gentex computer to the Kelly Air Force Base computer. The Gentex copy of

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the telex contains the answerback code "DIR PRO PR SNT" at both its beginning and end. The date that the telex was sent was typed in. Gentex also has provided the firm's log of all telexes sent on November 20, contending that Gentex's internal reference number on the log and the same number on the Gentex copy of the telex indicate that the telex was sent on November 20. In addition, Gentex asserts that had the Air Force not delayed 6 months in processing offers, the agency telex room records for November 1985 would not have been destroyed. In this respect, the record indicates that the Air Force routinely destroys telex room records every 3 months.

An offeror has the ultimate responsibility for assuring the timely arrival of its offer, and any modifications, at the place designated in the solicitation. See Hargis Construction, Inc., B-221979, May 6, 1986, 86-1 C.P.D. ¶ 438. A telegraphic modification to other than the otherwise successful offer, which is received after the closing date for receipt of proposals, may be considered only if received before award and the late receipt is due solely to mishandling by the government after receipt at the government installation. Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.215-10(a)(2) (1985). Moreover, the only acceptable evidence to establish the time of receipt at a government installation is the installation's time/date stamp on the proposal wrapper, or other documentary evidence of receipt maintained by the installation. FAR, 48 C.F.R. § 52.215-10(e).

Here, Gentex has not satisfied the requirements of the FAR, since timely receipt at an installation must be established by reference to evidence not within the offeror's control. See Monroe Wire & Cable Co., B-221896, May 28, 1986, 86-1 C.P.D. ¶ 494. According to the agency, as verified by Western Union, if an offeror transmits a telex on a personal computer, that document is within the control of that offeror. It is possible, therefore, for that offeror to type in a time, date and answerback. In this case, Gentex acknowledges typing in the date on the telex, and the only other evidence of receipt by the Air Force is the answerback code on Gentex's copy of the telex, a document clearly within Gentex's control.

We have recognized a narrow exception to the acceptable-evidence rule for situations where the sender cannot prove actual physical receipt at the installation. That exception is where government mishandling in the process of receipt was the paramount cause for nonreceipt of the modification at the installation. Hargis Construction, Inc., B-221979, *supra*. For example, we have applied the exception where an agency permitted a telex machine to run out of paper, Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 C.P.D. ¶ 331, and when an agency did not exercise due care in insuring use of the telex machine was not suspended for failure to pay Western Union the service fee. The Standard Products Co., B-215832, Jan. 23, 1985, 85-1 C.P.D. ¶ 86. Gentex's situation does not fall within this exception, however, since there is no evidence at all in the record to establish that government mishandling in the process of receipt was the paramount cause for nonreceipt of its modification by the Air Force.

Because Gentex's protest on this basis has no legal merit, we need not address the Air Force's assertion that Gentex's offer was nonresponsive.

The protest is denied.

for Seymour E. Van
Harry R. Van Cleve
General Counsel